

**Date: December 17, 1998**

**Case No.: 1989-ERA-22**

**In the Matter of:**

**SHANNON T. DOYLE**  
**Complainant,**

**against**

**HYDRO NUCLEAR SERVICES,**  
**Respondent.**

**APPEARANCES:**

**STEPHEN M. KOHN, ESQ.**  
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On behalf of the Complainant

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and

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On behalf of the Respondent

## PARTIAL ORDER ON SUMMARY JUDGMENT MOTIONS

### Procedural History

Complainant filed his complaint alleging a violation of the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (“ERA”), after he was fired for refusing to sign a release which he believed would waive his rights under the ERA. A Recommended Decision and Order of July 17, 1989, found that Complainant was not protected under the ERA. This ruling was reversed by the Secretary of Labor on March 30, 1994, and remanded on September 7, 1994, for a ruling on damages. A second Recommended Decision and Order was issued November 7, 1995, awarding Complainant back pay, front pay, compensatory damages, interest, attorney’s fees, costs, and other alternative relief. On September 6, 1996, the Administrative Review Board issued a Final Decision and Order, which generally upheld the Recommended Decision and Order. After the parties were unable to reach agreement on the average hourly wage rate, appropriate discount rate, and resulting calculations of back and front pay, the case was remanded again for a final damage proceeding. The case was forwarded to a settlement judge for mediation. After a June 10, 1998, mediation session, the parties entered into a Stipulation establishing the average hourly straight-time wage rates earned and projected to be earned in the future by decontamination technicians in the nationwide nuclear industry for each year since 1988. Agreement was also reached on the proper discount rate, ending date of the back pay period, and beginning and ending dates of the front pay period. The parties agreed to try to resolve any remaining issues quickly.

On July 1, 1998, Complainant filed a Motion for Summary Judgment. On July 17, 1998, Respondent filed a response, moved to strike portions of Complainant’s Motion for Summary Judgment, and moved for a stay of disposition. On September 3, 1998, this court issued an Order Denying Complainant’s Motion for Summary Judgment, and Granting Respondent’s Request for Discovery and Motion to Strike Portions of Complainant’s Motion for Summary Judgment. The Order struck portions of Complainant’s motion which sought recovery for “tax effects,” granted an additional 30 days to complete discovery, and 15 days thereafter to file briefs on any remaining issues.

Complainant filed a Motion to Set Hearing Date on November 6, 1998.<sup>1</sup> Respondent filed its Opposition to this motion on November 11, 1998, arguing that while a hearing probably would be necessary on at least some issues, it would be premature to set a date until all outstanding motions were resolved. Also on November 11, Respondent filed a Cross-Motion for Summary Judgment, and an Opposition to Complainant’s Motion for Summary Judgment. On November 12, Complainant filed a Statement on Summary Judgment, in which he argued again that Summary Judgment was proper. On November 18, 1998, Complainant filed a Response to Respondent’s Opposition to

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<sup>1</sup> Although motions for summary judgment were pending, and the parties were still actively engaged in stipulation discussions, the motion urged the court to set a hearing date. It was argued that doing so would assist the parties in their planning and allow the matter to be resolved as expeditiously as possible.

Setting a Hearing Date, and a Motion for Expedited Consideration of All Remaining Matters.<sup>2</sup> Complainant filed a Response to Respondent's Cross Motion for Summary Judgment on November 23, 1998. On December 4, 1998, Respondent filed a Supplemental Memorandum of Law on the various Summary Judgment motions. Finally, on December 9, 1998, Complainant filed a Response to Respondent's Supplemental Memorandum of Law.

## **Issues**

A review of the briefs and motions indicates that the following issues are still unresolved:

- 1.) Proper calculation of the back pay award;
- 2.) Proper calculation of the front pay award;
- 3.) Availability of interest on the front pay award, whether interest on both the front and back pay awards should be compounded, and the proper timing of interest calculations;
- 4.) Whether Complainant is entitled to lost benefits, the types of benefits, and in what amounts; and
- 5.) Whether Complainant has any additional interim earnings.

Complainant argues all of these issues may be decided by the court on Summary Judgment. Respondent argues that while many of these issues may be decided on Summary Judgment, at least the issue of interim earnings requires a formal hearing.

## **Discussion**

29 C.F.R. § 18.40 provides that, within certain specified time limits, any party may move for summary decision on any or all issues in a proceeding. An Administrative Law Judge "may enter summary judgment . . . [if the evidence shows] that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (1998). Both parties have moved for summary judgment on the issues of back pay, front pay, prejudgment interest, and benefits. Of course, they disagree strenuously over which side should prevail on each issue.

### 1. Calculation of Back Pay

In my Recommended Decision and Order on Remand of November 7, 1995 ("R.D.O.R."), I found that Complainant was entitled to an award of back pay for the period of time he would have worked but for the wrongful termination by Respondent. For reasons detailed in that Decision,

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<sup>2</sup> If issues remain unresolved, the parties have agreed to a hearing beginning February 8, 1999.

Complainant was awarded back pay from November 1988 until final judgment, minus any interim earnings. The award assumed Complainant would have been hired by Respondent for the period of November 21, 1988, to December 31, 1988; after that, it was assumed Complainant would have found at least 6 months of work per year with Respondent or another similar employer. The amount of the award was based on 40 hours of straight time and 32 hours of overtime per week at \$6.50 per hour. Complainant's request for compensation for lost promotional opportunities was denied.

The Administrative Review Board (ARB) affirmed most of the Recommended Decision on September 6, 1996. (See Sept. 6, 1996 Final Decision and Order ("1996 ARB Dec.")). The ARB agreed that back pay should continue past the date that Complainant would have been laid off, since it was likely Complainant would have been rehired by Respondent; the ARB also agreed that Respondent's denial of access and subsequent nationwide reporting of that denial made it impossible for Complainant to find similar work. The ARB found the assumptions of 6 months of work per year and 32 hours of overtime per week reasonable. However, the ARB felt that the wage used in calculating back pay should be the average hourly amount earned by decontamination technicians nationwide, including any annual increases (but not promotions). The parties were encouraged to agree on an average hourly wage for technicians nationwide.

After the parties were unable to reach an agreement, the ARB remanded to the OALJ to determine the average hourly wage earned by decontamination technicians nationwide since 1988.<sup>3</sup> The remand order reiterated that "For all years, back pay shall represent six months of work and work weeks shall comprise 40 hours of straight pay and 32 hours of overtime pay." (1997 ARB Remand, p. 5, quoting 1996 ARB Dec. at 6).

After remand, the case was referred to a settlement judge for mediation. On June 10, 1998, the parties stipulated to the average annual straight time wage earned by decontamination technicians nationwide in each of the years from 1989 to 2002, and to a cut-off date for back pay of June 30, 1997.<sup>4</sup>

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<sup>3</sup> The ARB stated that the wage used to calculate 1988 back pay was established at \$6.50 per hour straight time and \$9.75 per hour overtime. These are the wages Complainant would have earned if he had been hired by Respondent during the 1988 outage. (See 1996 ARB Dec., p. 6).

<sup>4</sup> See Respondent's Exhibit D to Cross Motion for Partial Summary Judgment; Complainant's Exhibit 1 to July 1, 1998 Motion for Summary Judgment.

Each party submitted calculations of the total back pay award. Complainant submitted two reports prepared by Mr. Martin B. Hobby,<sup>5</sup> dated June 18, 1998, and November 12, 1998. (“Hobby I” and “Hobby II,” respectively; Hobby I is Exhibit 2 to Complainant’s July 1, 1998 Motion for Summary Judgment, and Hobby II is Exhibit 1 to Complainant’s November 12, 1998 Statement on Summary Judgment). Additionally, Complainant has submitted a report prepared by Dr. Steven I. Jackson, Ph.D.,<sup>6</sup> dated June 30, 1998. (“Jackson report;” Exhibit 4 to Complainant’s July 1, 1998 Motion for Summary Judgment).<sup>7</sup>

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<sup>5</sup> A statement of Mr. Hobby’s qualifications is attached to the “Hobby I” report. Mr. Hobby’s educational background is not discussed. He is a former nuclear industry worker involved in his own “whistleblower” case. (See Hobby v. Georgia Power Co., 90-ERA-30). The Secretary’s decision in that case (Aug, 4, 1995) described him as having “unsurpassed” knowledge of the nuclear industry. Mr. Hobby claims expertise in various computer software application programs which he used to prepare damage reports in his own case. He now provides computer support to Complainant’s (and his own) attorney.

Apparently realizing his suspect status as an “expert,” Mr. Hobby states his report was prepared under the “direction, guidance, and approval” of Dr. Jackson. (See Hobby I, p. 1).

<sup>6</sup> Dr. Jackson’s qualifications are also provided with his report. He received a B.A. from Stanford in International Relations; a M.Sc. (Econ) from the London School of Economics; and an M.A., M.Phil., and Ph.D. in Political Science from Yale University. He currently teaches both undergraduate and graduate courses in social science, historical research methodology, and has taught courses in econometrics and international economics. Additionally, he was qualified as an expert in research methodology in Hobby v. Georgia Power Co., (90-ERA-30).

<sup>7</sup> Note that Dr. Jackson admits he did not perform independent calculations; instead he “relied heavily in my determinations on the painstakingly detailed efforts of Mr. Hobby . . . [and] supervised that work actively, checked the assumptions against original sources, and manipulated the spreadsheets used for the calculations to be as certain as possible that the results reported are as accurate as possible.” (Jackson report, p. 4).

Respondent's report was prepared at The Center for Forensic Economic Studies by Jerome M. Staller, Ph.D.,<sup>8</sup> and Edward A. Friedman, Ph.D.<sup>9</sup> ("Staller report," Exhibit E to Respondent's November 11, 1998 Cross Motion for Summary Judgment).<sup>10</sup>

1a. Back Pay in 1988<sup>11</sup>

Complainant expected to begin work for Respondent at the D.C. Cook Nuclear Power Plant in November, 1988. The job would last only as long as the scheduled outage, or from November 21, 1988, to December 31, 1988. When the outage ended, Complainant and other temporary workers hired at the same time would be laid off. Thus, unlike other years for which Complainant was awarded back pay, there is clear evidence of the wage rate and hours Complainant could have expected.

I found earlier that the ten other workers hired with Complainant in 1988 worked from November 21, 1988 until the end of the outage on December 31, 1988, with the exception of the weeks ending November 25, 1988 and December 2, 1988. (See R.D.O.R. p. 7, finding 32). I also found that the average number of hours worked during this period was 149.2 hours of regular or straight time, and 93.7 hours of overtime. (See id., finding 34). Based on these findings, as well as my finding that Complainant would have worked for Respondent or some other company again, I ordered that Complainant be paid six months per year of back pay at a rate of \$556.00 per week. (See id., p. 22).

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<sup>8</sup> Dr. Staller received a B.A. in Economics from Temple University in 1967, and a Ph.D. in Economics from Temple in 1975. He has served in a number of government positions, including as a Senior Staff Economist with the U.S. Department of Labor. His qualifications list several pages worth of articles, papers, and books on economics and damages. He has lectured and taught at a number of universities, and is currently president of the Center for Forensic Economic Studies. (See Exhibit A, Respondent's November 11, 1998 Cross-Motion for Summary Judgment).

<sup>9</sup> Dr. Friedman received a B.A. in Mathematics from Dartmouth College in 1973, and a Doctorate in Economics from Yale University in 1978. He has worked for several national corporations, and served as an assistant professor of Finance at Temple University. He also has published several articles and papers on economics and damages. He is currently a Senior Economist with the Center for Forensic Economic Studies. (See Exhibit B, Respondent's November 11, 1998 Cross-Motion for Summary Judgment).

<sup>10</sup> Although not submitted by Respondent, another report by Staller and Friedman prepared on October 7, 1998, has been submitted by Complainant as Exhibit 2 to Complainant's November 12, 1998 Statement on Summary Judgment.

<sup>11</sup> For reasons which will become apparent in the discussion, back pay for 1988 is addressed separately.

The ARB's Final Decision and Order of September 6, 1996 (ARB Dec.), generally affirmed the Recommended Decision. Back pay for 1988 was calculated using 32 hours per week overtime, and wage rates of \$6.50 per hour straight time and \$9.75 per hour overtime. After 1988, wages would be based on a nationwide average rate, and 1.5 times that rate for overtime hours. (See ARB Dec. at 6). After the parties were unable to reach agreement on remaining issues, the ARB remanded to the OALJ to resolve the calculation of back pay. The ARB said: "for the year 1988, the wage rate to be applied is \$6.50 per hour straight time and \$9.75 per hour overtime . . . [and] for all years, back pay shall represent six months of work and work weeks shall comprise 40 hours of straight pay and 32 hours of overtime pay." (ARB Remand at 5).

The parties performed their calculations based on these instructions and the stipulations agreed to on June 10, 1998. For November and December 1988, Respondent calculated that Complainant was owed a total of \$1,716.00.<sup>12</sup> (See Staller report, p. 2).<sup>13</sup> To simplify calculations, the number of hours per week is first converted to 88 hours per week of straight time equivalent ("STE").<sup>14</sup> Then, the report divides the 88 hours in half to account for the "six months of work" instruction of this court and the ARB, resulting in 44 hours per week STE.<sup>15</sup> Multiplying this by the stipulated straight time hourly wage of \$6.50 and the 6 weeks Complainant would have worked in 1988 leads to the result of \$1,716.00. (See *id.*).

Complainant's three reports all differ somewhat. The Jackson report does not segregate 1988 income, so I will not discuss it in detail. Hobby I provides daily totals in all of Complainant's damage

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<sup>12</sup> Except where otherwise specified, "totals" refers to principal amounts only. Appropriate interest on the various principal totals is discussed below.

<sup>13</sup> An earlier Staller report, dated October 7, 1998 (submitted by Complainant, Exhibit 2 to Complainant's Statement on Summary Judgment), found Complainant was owed \$1,630.00 for his work in 1988. The reason for the increase in the later Staller report is unexplained. However, this is the only period for which I could not reproduce a total by using the methods and figures specified in the report. Thus, I assume the \$1,630.00 total was simply a mathematical error.

The only other significant change between the two Staller reports involves the calculation of interest, which is discussed below.

<sup>14</sup> Neither party has explained their calculations, or what is wrong with the other side's calculations, to my full satisfaction. To check methodology and unstated assumptions, I was often forced to "work backwards" from the totals.

For example, one method of obtaining the 88 STE hours per week figure is to calculate a total weekly pay, and then divide this amount by the stipulated straight time wage for that particular year. For example, in 1988 the calculation would be:  $((40 \text{ hours} \times \$6.50) + (32 \text{ hours} \times \$9.75)) \div \$6.50 = 88 \text{ STE hours per week}$ . This figure can then be used for each year.

<sup>15</sup> I have assumed a reduction from 88 to 44 hours because this leads to the same total presented in the report.

categories; Hobby II provides totals by quarters. For 1988, Hobby I apparently assumes full 88 hour STE weeks over the entire 6 week period, resulting in a total of \$3,432.00 “earned” in 1988.<sup>16</sup> However, due to the method used to credit this to Complainant, only \$2,288.00 is “paid” in 1988. (See Hobby I, p. 8). Hobby II drops daily totals in favor of quarterly results; however, it also lists a 1988 total of \$2,288.00. (See id., p. 2, 3).<sup>17</sup>

The Hobby reports are somewhat misleading because they “pay” Complainant on the same schedule as though he were actually working. Based on a typical pay schedule, Complainant’s reports assume a two week pay period, with “payment” being issued a week after the close of each pay period. (See Hobby I, p. 3). As a result, the first “payment” is made 3 weeks after the assumed start date of November 21, 1988, and the final “payment” for 1988 work is made on January 6, 1989. (See id. p.8). Thus, a portion of the “payment” for 1988 is credited to Complainant’s 1989 totals, making it appear that Complainant is requesting only \$2,288.00 for 1988 instead of \$3,432.00.

However, I believe the calculation methods used by both parties are incorrect. If Complainant had been hired by Respondent, he would have worked only 4 weeks out of the relevant 6 week period in 1988. (See R.D.O.R. p. 7, finding 32, citing RX-2-5). Neither party has addressed this in their calculations. As explained above, Respondent’s method pays for only 3 weeks of full-time 88 STE hours per week work (or 6 weeks of half-time 44 STE hours per week work). Complainant’s method pays for 6 weeks of full-time 88 STE hours per week work (although actually only 4 weeks worth appear in the 1988 totals). Thus, neither calculation accurately represents what Complainant would have worked and earned.

The best method is to calculate 1988 back pay based on 4 weeks of 88 STE hours per week work, which is what the evidence shows Complainant probably would have worked if he had been hired. This is consistent with the oft-stated goal of back pay: to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination. (See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)). As discussed above, Respondent’s method results in Complainant being paid for one less week than he probably would have worked, while Complainant’s method results in an extra two weeks. Neither truly restores Complainant to the economic position he would have occupied but for the unlawful discrimination.

I do not believe this finding to be inconsistent with the ARB’s instructions. The ARB specified that for 1988, calculations must use the wage rates Complainant would have earned working for Respondent. I do not believe that the statement “[f]or all years, back pay shall represent six months of work . . .” means that the ARB thought Complainant should be compensated for only half the number of weeks he would have worked in 1988. A more reasonable interpretation is that for

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<sup>16</sup> (6 weeks) X (88 STE hours per week) X (\$6.50) = \$3,432.00

<sup>17</sup> I assume that Hobby II also finds \$3,432.00 earned in 1988, but only “pays” \$2,288.00, since the back pay totals for 1988 and 1989 are the same in both reports.

all years, Complainant shall not be paid more than the equivalent of six months work at the specified rates. The six month figure is speculative anyway, since it is impossible to know the actual amount of time Complainant would have worked each year for Respondent or other similar employers after 1988.

Therefore, I find that Complainant is entitled to \$2,288.00 in back pay for 1988. This is based on four weeks of work during the six week period, at 88 hours STE per week, and \$6.50 per hour. This total represents what he would have earned in the relevant period of 1988, regardless of when it is “credited” or “paid.”

#### 1b. Back Pay from 1989-1987

Complainant was awarded back pay after 1988 because I found, and the ARB agreed, that absent Respondent’s actions, it was likely Complainant would have found future employment with Respondent or some other employer in the nuclear field. (See R.D.O.R., p. 14-15; ARB Dec., p. 3). Normally back pay runs until final judgment, but the parties agreed in their June 10, 1998 stipulations to a back-pay cut-off date of June 30, 1997. (See Respondent’s Exhibit D to Cross Motion for Partial Summary Judgment; Complainant’s Exhibit 1 to Motion for Summary Judgment). Because the back pay award for 1988 is discussed above, I now concern myself only with 1989 to June 30, 1997.

Complainant’s Hobby I report calculates a total back pay award of \$219,687.53. (See Hobby I, p. 2).<sup>18</sup> After deducting the incorrect 1988 work total of \$3,432.00, the remaining 1989-1997 total is \$216,255.53. Complainant’s Hobby II report calculates a total back pay award of \$220,843.85. (See Hobby II, pp. 2 and 5) Again, after deducting the incorrect amount claimed for 1988, the new total for 1989-1997 is \$217,411.85.<sup>19</sup> Thus, Hobby II results in an increase in back pay of \$1,156.32; this increase is not explained, nor can I discern any reason for it.

Complainant’s Jackson report (based on the Hobby I report) states Complainant is due a total back pay award of \$219,559.05, through June 30, 1997. (See Jackson report, p. 7). The difference

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<sup>18</sup> All reports for 1989-1997 back pay include deductions for other income earned by Complainant. There is some dispute over whether Complainant has additional income which has not been included; this issue is discussed below. However, in discussing the proper calculation of back pay, I have assumed that the amount of earnings previously agreed to by the parties, and as utilized in their respective reports, is correct. If these figures are later shown to be incorrect, it is a simple matter to recalculate the totals.

<sup>19</sup> Actually, Hobby II provides a separate calculation of back pay for this period of \$218,555.85. However, due to the 3 week delay in crediting earnings used in Complainant’s calculations (discussed above), the total contains one payment for work done in 1988. Thus, the \$217,411.85 figure represents what Complainant claims he would have earned in back pay from 1989 to 1997.

from the Hobby I report is \$128.48, which represents back pay wages accrued but not “credited” as of June 30, 1997, due to the 2 week pay period/1 week delay payment system utilized in Complainant’s reports. Dr. Jackson notes in a footnote that this amount is owed, but under his methods it is not paid until July 11, 1997, after the back pay cut-off date. (See id., p.7, n.8). Of course, after subtracting the incorrect amount “earned” in 1988, the Jackson report yields the same total for 1989-1997 as the Hobby I report.

Respondent’s Staller report calculates a total back pay award of \$217,806.00.<sup>20</sup> (See Staller report, p. 2, 3). After subtracting out its incorrect 1988 back pay total, its total for 1989-1997 is \$216,090.00

Most of the difference between the parties’ totals can be explained by differing methods of timing back pay “payments.” It appears that each side’s calculations were made using the appropriate stipulated yearly compensation rate, and using the correct number of hours as instructed by the ARB.

Respondent’s Staller Report takes a simple, more direct approach. First, the average number of weekly hours (as found by this court and approved by the ARB) is converted into 88 straight time equivalent hours (STE) per week.<sup>21</sup> Then, to compensate for the finding that Complainant would have worked six months per year, the 88 hours is divided in half, resulting in 44 STE hours per week; when multiplied by 52 weeks, this results in a total of 2,288 STE hours per year.<sup>22</sup> After this calculation has been made once, calculating back pay for each year is a simple matter of multiplying 2,288 hours by each year’s stipulated nationwide average hourly wage for decontamination technicians. (See generally, Staller report, p. 2). Thus, Respondent’s totals are based on an equal amount of hours and weeks each year, making it irrelevant when payments are “credited” each year.

Complainant uses a different method. As discussed above, the Hobby I report tries to reproduce in exact detail the way Complainant might have been paid if he was still employed; i.e., “pay periods” of two weeks, plus a one week delay before payment.<sup>23</sup> What complicates this system and accounts for some of the difference between Complainant’s and Respondent’s totals is the way

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<sup>20</sup> The Staller reports round all totals to the nearest whole dollar. Since the report appears to follow the general principle of rounding either up or down to the closest whole number, I find such rounding to be reasonable.

<sup>21</sup> This calculation is explained supra, note 14.

<sup>22</sup> Of course, the same result can be obtained by the following calculations: (26 weeks) X (88 hours STE) = 2,288 hours per year; or (52 weeks) X (88 hours STE)/2 = 2,288 hours per year.

<sup>23</sup> Since the Jackson report relies almost completely on Hobby I, and Hobby II apparently merely re-totals on a quarterly basis, it is only necessary to discuss Hobby I when explaining this calculation method.

the annual increase in the pay rates is handled.<sup>24</sup> Since the Hobby I report is based on the actual calendar of each year, some “pay periods” cross from one year to the next.<sup>25</sup> When this occurs, Hobby prorates the wages so that the portion of the pay period in one year is paid at one rate, while the portion falling in the next year is paid at the new, and usually higher, rate. (See Hobby I, p.3). The result is that the first few “paychecks” in any given year are for a different amount than each “paycheck” for the remainder of the year. (See generally, *id.*, pp. 8-49). Additionally, because of the one week delay from the end of a “pay period” to the “credit” of the pay, sometimes wages “earned” in one year are not “credited” until the next. (See, e.g., discussion of 1988 back pay, *supra*).<sup>26</sup> In fairness, I note that in some years this scheme actually results in lower payments to Complainant; however, over the full period back pay period, it clearly results in a gain.

Thus, I must choose between these two competing methods. There are arguments in favor of each: Staller’s is simpler and easier to calculate; Hobby/Jackson’s arguably provides Complainant with a closer approximation of what he lost. To assist my decision, I examine the qualifications of the experts and the instructions of the ARB.

As an initial matter, I choose to discount the reliability of the Hobby II report due to its unexplained increase in the back pay award. (Compare Hobby I, p. 2 with Hobby II, p. 2). Since Hobby II only provides quarterly totals, I have been unable to determine any reason for the increase.<sup>27</sup> Additionally, the Hobby II report does not indicate it was reviewed or approved by Dr. Jackson, unlike the Hobby I report.

I also choose to rely on reports by experts more qualified than Mr. Hobby. While Mr. Hobby may have “unsurpassed” experience in the nuclear industry, that does not necessarily translate into expertise in calculating damage awards. Mr. Hobby apparently has some experience with computer software and the calculation of such awards, but I choose to rely on the more qualified experts.

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<sup>24</sup> The ARB’s Final Decision and Order of September 6, 1996, found that Complainant was entitled to back pay calculated using the “average hourly amount earned by decontamination technicians in the nationwide nuclear industry in each year . . . .” (ARB Dec., p. 6). The parties stipulations reflect that this average wage has generally increased each year.

<sup>25</sup> Simple arithmetic demonstrates that a 365 day year is actually 52 weeks and one day long (52 weeks X 7 days = 364 days). In leap years, a year is 52 weeks and 2 days long.

<sup>26</sup> For example, there are a total of 27 paychecks “credited” to Complainant in 1993.

<sup>27</sup> While there may be a simple explanation for the increase, no explanation was provided, nor was I able to determine the reason for such an increase on my own. However, by comparing Hobby I and II, I was able to determine that the increase first appears in the 1997 totals.

I also note that there is an increase in the back pay award between the two Staller reports; however, in my opinion, that actually favors credibility, since such an increase in back pay would actually favor Complainant.

I also choose to rely on the Staller report over the Jackson report. While Dr. Jackson certainly has an impressive background, I note that most of his degrees are in International Relations or Political Science. (See Jackson report, p. 2). Additionally, his own statement of qualifications lists papers on subjects such as “the impact of international trade and financial transactions on development in the developing countries,” and “the impact of plant closing legislation on employment, job creation, and new business formation.” (Id.). In contrast, both Dr. Staller and Dr. Friedman both have advanced degrees in economics, and the majority of their publications are in the field of damage calculation. (See Exhibits A and B to Respondent’s Cross-motion for Summary Judgment). Finally, Dr. Jackson apparently did not perform independent calculations; instead, he “relied heavily” on Mr. Hobby’s reports.

I also believe that some of the assumptions and methods used in Hobby/Jackson are unproven and unrealistic. To cite a single example, I find it difficult to believe that an employer would prorate a pay raise across a pay period; most employers will simply apply the increase to the next full pay period. This too leads me to conclude against crediting Complainant’s reports.

I also do not think Complainant’s methods are consistent with the ARB’s instruction that “back pay [will] be calculated at six months’ work per year, at 40 hours straight time and 32 hours per week overtime.” I believe this instruction serves two purposes: first, to provide a fair estimate of what Complainant might have worked in future years, since it would be impossible to know with any certainty; and secondly, to avoid a fight over detailed minutiae, which could drag this matter on for years and deny Complainant the compensation he is clearly due. Since it would be impossible to know which six months in any given year Complainant would have worked, the ARB tried to avoid a dispute with its instruction; however, Complainant’s methods re-inject disputes over these kinds of details. Thus, I find that Respondent’s reports comply more closely with both the letter and the spirit of the ARB’s decision.

Complainant cites other decisions which say that overwhelming exactitude is not required in damage awards, and that any uncertainty must be resolved in favor of the Complainant. (See, e.g., Lederhaus v. Donald Paschen, 91-ERA-13, Decision and Order of Secretary (Oct. 26, 1992). I see no conflict with that here. I need not resort to such a “rule of thumb” when there are other ways of resolving the issue. Here I have chosen to rely on more qualified experts and reports which closely follow the ARB’s instructions.

Therefore, I grant summary judgment in favor of Respondent, and find that Complainant’s back pay award shall be based on Respondent’s calculations of 2,288 hours per year multiplied by each year’s stipulated nationwide average wage for nuclear decontamination technicians. This results in a total 1989-1997 back pay award of \$216,090.00, and a total back pay award for 1988-1997 of \$218,378.00.

## 2. Calculation of Front Pay

Again, the parties are fairly close on the amount of front pay, yet they have been unable to stipulate to an exact amount. Previous decisions awarded front pay for a total of 5 years from the end of the back pay period. (See R.D.O.R. at 19-20; ARB Dec. at 7-9; ARB Remand at 3-5). Since the parties have agreed to a back pay cut-off date of June 30, 1997, the front pay period will end on July 1, 2002. The difference between the parties primarily results from the number of work weeks per year each side assumes.

Complainant's Hobby I is very detailed, computing actual work weeks in each year to the first decimal place (e.g., 26.4 in 1997; 52.2 in 1998, 52.2 in 1999, etc.), because sometimes there are slightly more than 52.0 work weeks in a particular year, depending on how the days of the week fall in that year. (See Hobby I, p. 5). The net result is that over the full 5 year front pay period, Complainant claims an extra 1.8 weeks, or \$1,177.44 in front pay principal.<sup>28</sup> In contrast, Respondent simply assumes a flat 52 work weeks per year.<sup>29</sup>

Hobby I calculates a total front pay principal award of \$171,404.64 or a final total of \$156,032.15, after deductions for other income and discounts to present value.<sup>30</sup> (See Hobby I, p. 5). Hobby II presents a total front pay principal (after deductions and discounting) of \$155,363.50. (See Hobby II, p. 2 & 6). Complainant explains that the new total in Hobby II results from a non-finalized agreement to "split the difference" between Hobby I and Respondent's Staller report. (See Complainant's November 12, 1998 Statement on Summary Judgment, p.7-8).

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<sup>28</sup> This total was obtained by multiplying the excess amount of work weeks for each year by the stipulated wage for that year. See Hobby I, p. 5, for the source of the "1.8 weeks" figure.

<sup>29</sup> Respondent's front pay calculations are identical to its back pay calculations: 2,288 STE hours per year multiplied by each year's stipulated wage to arrive at a total front pay for that year. Of course, for the half years of 1997 and 2002, the total is divided by 2.

<sup>30</sup> On June 10, 1998, the parties stipulated to a discount rate of 3.25%, which reduces the award to its present day value. (See Exhibit 1 to Complainant's July 1, 1998 Motion for Summary Judgment; Exhibit D to Respondent's November 11 Cross-motion for Summary Judgment).

Each report has also properly deducted \$500.00 per year in other earnings as instructed by the ARB in its 1996 Decision. (See 1996 ARB Dec., p. 8).

Respondent's Staller report calculates that Complainant is owed a total front pay principal award (after deductions for other income and present value discounting) of \$154,695.00. (See Staller report, p. 2).<sup>31</sup> The total difference from Hobby I is \$1,337.15.<sup>32</sup>

Most of the difference between Respondent's and Complainant's totals can be attributed to three factors: the "extra" 1.8 work weeks; Respondent's rounding of totals;<sup>33</sup> and Respondent's rounding of the "discount factor" to be used each year.<sup>34</sup> Additionally, the Staller report stated that some of the difference results from "de minimis differences in the precise timing of discounting to present value." (Respondent's Staller report at 3).<sup>35</sup>

The same factors involved in my decision on back pay also apply here. First, Respondent's experts simply appear to be better qualified than those relied on by Complainant. I find nothing improper in their use of "rounded" figures, in part because I am reluctant to find fault with the methods chosen by such experts; I also can find nothing wrong with their underlying assumptions and calculation methods, and the rounding is often to Complainant's benefit.

Even though Complainant's calculations are more detailed, Respondent's seem to follow the ARB's Order more closely: "would have worked. . . for 6 months per year. . . ." I simply can not reconcile the "6 months" instruction with Complainant's attempt to include extra work weeks in each year, or a total of 1.8 work weeks over the entire 5 year period.

Again, I note the case law which says uncertainties should be resolved against the discriminatory party. However, I do not think I need to resort to this "rule of thumb" in this instance. Hobby I results in Complainant receiving an extra 1.8 weeks of pay, in violation of the ARB's order

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<sup>31</sup> Unlike back pay for 1988 (discussed above), this total does not change between the two Staller reports (the reports of October 7, 1998, and November 2, 1998).

<sup>32</sup> Hobby I is used for comparison because, as explained in the text, the front pay total in Hobby II represents an attempt to settle the front pay issue.

<sup>33</sup> Respondent's report rounds up or down to whole dollar amounts; other figures, such as the discount factor, are also rounded either up or down. Again, I find such rounding reasonable.

<sup>34</sup> It is clear that a rather complex calculation is needed to obtain the proper discount factor from the stipulated discount rate. (See, e.g., Hobby I at 6). However, if Complainant's factors (which are taken to the sixth decimal place) are rounded off (to the second decimal place, as Respondent does) the factors used by both sides become the same. Thus, I am confident that the difference between the factors used by the parties can be accounted for by rounding.

<sup>35</sup> As this is not explained, I will not discuss it here.

to calculate the award on the basis of six months work per year (or impliedly, 26 weeks). If the ARB wished to allow for the possibility of more than 26 weeks, it would have specified which 6 months of each year to use.

Therefore, I grant Summary Judgment Motion, and find Respondent's calculations of front pay to be proper. Complainant is awarded a total front pay principal award of \$154,695.00.<sup>36</sup> If the amount of interim earnings is later adjusted, this total can be adjusted to reflect any change.

### 3. Interest<sup>37</sup>

While both parties apparently agree that Complainant is owed prejudgment interest on his back pay award, they dispute whether interest should be awarded on front pay, and the amount of interest owed on both front and back pay. Using compound interest, Hobby II calculates that through December 31, 1998, Complainant is owed \$140,936.34 in back pay interest, \$20,890.69 in front pay interest, or a total of \$161,827.03.<sup>38</sup> (See Hobby II, p. 2).

Respondent's Staller report calculates a back pay simple interest award of \$99,131.00 through October 1, 1998. (See Staller report, p.3). The earlier Staller report (submitted by Complainant), calculated a back pay interest award of \$122,743.00, through October 1, 1998; apparently this total is higher because it is based on compounded interest. (See Complainant's Statement on Summary Judgment, Exhibit 2, p. 3).<sup>39</sup> Respondent does not calculate interest on the front pay award because it argues that the ARB's instructions do not provide for interest on front pay. (See Respondent's Cross-motion for Summary Judgment, p. 9).

Thus, the three issues presented for decision are: 1) the availability of pre-judgment interest on the front pay award; 2) whether interest awards should be based on compounded or simple interest; and 3) the proper timing of interest calculations.<sup>40</sup>

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<sup>36</sup> This is the total has already been discounted to present value (as of July, 1997).

<sup>37</sup> The parties interest totals will vary somewhat due to the different principal totals they have calculated.

<sup>38</sup> I do not discuss Hobby I's interest calculations in detail since interest on front and back pay is not clearly segregated. Similarly, Dr. Jackson's report merely restates the total interest award allegedly due Complainant as of July 1, 1998. Both reports found that as of July 1, 1998, Complainant was owed a total of \$131,436.31 in interest on both back and front pay.

Additionally, all of Complainant's calculations are based on compound interest (discussed below).

<sup>39</sup> Respondent now argues that the use of compound interest was incorrect.

<sup>40</sup> Of course, any interest found proper continues to accrue until paid.

### 3a. Availability of Interest on Front Pay

I first note that this is an issue which rarely arises. Normally an award of back pay continues either until reinstatement or final judgment. When front pay is awarded in lieu of reinstatement, the front pay becomes due when back pay ceases, i.e., at final judgment. Thus, in most cases, there is no award of interest on front pay simply because front pay is not due yet.

However, as Complainant correctly points out, this is not a normal case. During attempts to stipulate on some of the damage issues, the parties agreed that the cut-off date for back pay would be June 30, 1997. They also agreed that the front pay period began on July 1, 1997. (See Respondent's Exhibit D to Cross Motion for Partial Summary Judgment; Complainant's Exhibit 1 to July 1, 1998 Motion for Summary Judgment). Complainant argues that interest on front pay is clearly due in this case, since it has been over a year since his back pay ended and his front pay became due. (See Complainant's Statement on Summary Judgment, Nov. 12, 1998, pp. 8-11). Complainant has yet to receive either award.

Respondent argues that an award of interest on the front pay is improper. Citing the language of the ARB in its September 6, 1996 Final Decision and Order, Respondent points out that the ARB awarded "back pay plus interest," but only "five years' front pay," with no mention of interest. Respondent argues that if the ARB wished to award interest on the front pay award it would have so specified. (See Respondent's Memorandum of Law in Support of Its Cross-Motion for Summary Judgment, Nov. 11, 1998, p. 9).

First, I find no merit in Respondent's position. It is obvious why the ARB failed to mention interest on the front pay award. When the ARB's decision was written, the case had not yet gone to final judgment, and the parties had not stipulated to cut-off dates for back and front pay. Therefore, back pay was still accruing, and the front pay award had not yet become due. There simply was no reason for the ARB to discuss front pay interest at that time.

I now find Complainant is entitled to prejudgment interest on his front pay award. In Shore v. Federal Express Corp., 42 F.3d 373, 380 (6<sup>th</sup> Cir. 1994), the court found front pay interest proper.<sup>41</sup> Shore involved a Title VII claim, and as part of the original judgment, the plaintiff was awarded five years front pay. Due to delays in the proceedings, judgment was entered after the accrual of a portion of the front pay. The court cited another Sixth Circuit decision, EEOC v. Wilson Metal Casket Co., 24 F.3d 836 (6<sup>th</sup> Cir. 1994) which explained the rationale for awarding prejudgment interest on back pay:

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<sup>41</sup> Complainant cites Shore as controlling, because Complainant argues both the Third and Sixth Circuit could be the "controlling" jurisdiction. (See Complainant's Statement on Summary Judgment, p. 9 n. 2). Although I make no finding as to which Circuit is "controlling," I have been unable to find any contrary Third Circuit cases, nor any Third Circuit cases even addressing this issue.

An award of prejudgment interest is an element of complete compensation in a Title VII back pay award. Prejudgment interest helps to make victims of discrimination whole and compensates them for the true cost of money damages they incurred.

Wilson Metal Casket Co., 24 F.3d at 841-42 (citations omitted). The Shore court then went on to say:

Although *Wilson* involved back pay, and the present case involves front pay, *Wilson* nevertheless governs the present case. Under the peculiar circumstances now before us, in which the pertinent judgment on front pay was entered subsequent to the accrual of a substantial portion of front pay that is as yet unpaid, the rationale for awarding prejudgment interest on front pay is precisely the same as that described in *Wilson* for awarding such interest on back pay.

Shore, 42 F.3d at 380.

I am aware that Shore involved a Title VII claim. However, I still find its reasoning persuasive. No contrary authority has been cited by either party, and I have found none in my own search. Therefore, I grant Summary Judgment for Complainant on the issue of front pay interest, and find that he is entitled to prejudgment interest on his full front pay award. Since front pay is awarded as a lump sum, and is discounted to “present value,” Complainant is awarded prejudgment interest on the entire discounted front pay award.<sup>42</sup> Of course, interest will continue to run until paid.

### 3b. Compounding of Interest

The next major dispute between the parties is whether interest should be compound or simple. Complainant argues for compound interest, while Respondent argues for simple interest.

Complainant cites a string of cases which he claims support the use of compound interest. (See Complainant’s Statement on Summary Judgment, pp. 11-14). However, I do not believe these cases support the result Complainant seeks.

One of the cases Complainant cites is EEOC v. Kentucky State Police Dept., 80 F.3d 1086 (6<sup>th</sup> Cir. 1996). However, a portion of that decision, at least as cited by Complainant, can be somewhat deceiving. Complainant’s brief said:

The Court [the Sixth Circuit] has held that a claimant can only be properly made whole if prejudgment interest is compounded: “As the

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<sup>42</sup> Awarding interest on the full discounted award obviates any need to recalculate the discounted total (or to “un-discount”) for those years of the front pay award which have passed.

Second Circuit has declared, ‘[b]ack pay . . . should ordinarily include compound interest.’ Back pay is awarded to make a claimant whole, and such relief ‘can only be achieved if [prejudgment] interest is compounded.’”

Complainant’s Statement on Summary Judgment, p. 13, quoting Kentucky State Police, 80 F.3d at 1098. Read out of context, it appears that the Sixth Circuit adopted the holding of the Second Circuit. However, both of the quoted sentences refer to Second Circuit decisions and are therefore not the true holding of the Sixth Circuit.

The Sixth’s Circuit’s true holding in Kentucky State Police is found a few lines further down: “We are inclined to agree [with the Second Circuit], but we believe that the decision whether to award compound or simple interest is in the trial court’s discretion.” Kentucky State Police, 80 F.3d at 1098. Unfortunately, the decision does not provide any guidance for a trial court to use when facing such a choice.

Complainant also cites “the most recent DOL ALJ opinion on this matter,” Hobby v. Georgia Power Co., 90-ERA-30, R.D.O. of ALJ.<sup>43</sup> Of course, the ALJ decision in Hobby is not binding on this court. Even if it was, the ALJ in Hobby clearly misread the decisions he claims to have relied on.

In Hobby, the ALJ said interest should be compounded quarterly, and cited another ALJ and two Secretary decisions in support. However, the ALJ Decision cited in Hobby, Willy v. The Coastal Corp., 85-CAA-1 (ALJ, May 8, 1997), clearly states interest is “calculated” quarterly, and that 29 C.F.R. 20.58(c) expressly prohibits the award of “interest on interest.”<sup>44</sup> (See Willy, pp. 12-13).

The other Decision cited by the ALJ in Hobby to support his decision to award compound interest is OFCCP v. WMATA, 84-OFC-8 (Ass’t Sec’y Aug. 23, 1989). However, even Complainant admits that this case has created much confusion and is probably not controlling on these facts. (See Complainant’s Statement on Summary Judgment, p. 12, n. 4).

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<sup>43</sup> This is the same Hobby who prepared the damages report for Complainant in this case.

<sup>44</sup> Complainant also argues that the Hobby report’s methodology reproduces the exact methodology of the ALJ’s calculations in Willy. (See Complainant’s Statement on Summary Judgment, p. 14, n. 5). According to Complainant, the ALJ’s calculations show compounded interest. However, I have reviewed the Willy calculations and I see no evidence that interest was compounded quarterly; instead, it appears that the ALJ very carefully segregated out interest for each quarter. (See Willy, App. A).

Additionally, as the ALJ in Willy said, 29 CFR § 20.58(c) clearly states “Interest shall not be assessed on interest. . .” Although that subsection is found in the regulations dealing with collection of federal claims, both it and the rate of interest prescribed in § 6621 of the Internal Revenue Code are used to calculate interest in whistleblower cases. In fact, the ARB’s Final Decision and Order specifies that interest shall be paid “at the rate specified in 26 U.S.C. § 6621.” (ARB Dec., p. 10).

I find no reason for an award of compound interest; therefore all back and front pay interest calculations shall be performed using simple interest only.

### 3c. Timing of Interest Calculations

The parties also disagree over the proper timing of interest calculations. As an initial matter, I note that the Hobby I report incorrectly calculated interest on a daily basis. (See generally, Hobby I, pp. 7-61). However, Complainant now seems to agree that interest must be calculated on a quarterly basis. (See Hobby II, p. 1; see also, Willy v. The Coastal Corp., 85-CAA-1, (ALJ, May, 8, 1997)).

Respondent argues that Complainant’s interest calculations are incorrect because they assume that interest accrues in the same period in which the loss occurs. (See Respondent’s Cross-motion for Summary Judgment, p. 9). Respondent argues that each quarterly interest calculation should be based on the previous quarter’s cumulative principal total. This becomes clearer with a few examples.

In the fourth quarter of 1988, Respondent calculated \$1,716.00 in back pay principal owed, but no interest. The first quarter of 1989 shows a cumulative back pay principal of \$6,521.00, but only \$47.00 in interest; the \$47.00 represents the interest owed on the \$1,716.00 from the fourth quarter of 1988. In sum, Respondent argues no interest accrues until after the principal is owed, i.e., the next quarterly period. (See Staller report, p.3). The Staller report argues this is logical, because “a loss which occurs in a particular time period generates interest which would be paid in the following time period.” (Staller report, p. 3).

In contrast, Complainant’s reports calculate interest by including the new principal owed in each quarter. For example, in the fourth quarter of 1988, Complainant finds \$2,288.00 of back pay principal owed, plus \$62.92 in interest. For subsequent years, each quarter’s new principal is added to the existing cumulative principal, then interest for that quarter is calculated on the new total. (See Hobby II, p. 5).

After a review of the briefs and the evidence, I agree that the calculation method used by the ALJ in the Willy decision is correct: calculate cumulative principal owed each quarter, then multiply that total by the applicable interest rate to find the interest owed for that quarter. (See Willy v. The Coastal Corp., 85-CAA-1, App. A).

To summarize, Complainant is awarded interest on both back and front pay, using simple interest only. Additionally, each quarter’s interest calculations shall be made on the cumulative

principal total, including any principal earned in that quarter. The parties shall recalculate interest awards in conformity with these instructions and submit them to the court.

#### 4. Benefits

There are two main categories of benefits in dispute: 1) Retirement benefits; and 2) Medical benefits. The ARB's September 6, 1996 Final Decision and Order stated:

Respondent shall pay Complainant any benefits to which he would have been entitled if he had not been discriminated against, including out of pocket medical expenses that would have been paid by health insurance available to him as Respondent's employee . . . from the date of the discriminatory refusal to hire until final judgment."

(ARB Dec., pp. 10-11).

However, before I discuss benefits, I must first address another issue raised by the parties. As part of its submission in opposition to Complainant's Summary Judgment Motion, and in support of its own Cross-motion for Summary Judgment, Respondent submitted the affidavit of Ms. Sally Maybray. (See Exhibit H to Respondent's Cross-motion for Summary Judgment).

Ms. Maybray is a Human Resources Manager with Respondent's successor in interest, Westinghouse Nuclear Services Division. According to Ms. Maybray, an employee who worked the same number of hours as Complainant would only be entitled to purchase medical and dental insurance; he would not have been entitled to any other benefits. Ms. Maybray also stated the employee's costs for the various levels of medical/dental coverage, and provided a copy of the insurance plan which was available for purchase. (See id., p.2).

Complainant objects to this affidavit, claiming Ms. Maybray was never identified as a potential witness despite Complainant's repeated discovery requests for such information. (See Complainant's Response to Respondent's Cross-motion for Summary Judgment, pp. 4-10). Complainant points out that Federal Rule of Civil Procedure ("FRCP")<sup>45</sup> 26(a) requires parties to identify the names of individuals likely to have relevant, discoverable information. If a party fails to disclose such information, FRCP 37(c)(1) provides that unless the party who failed to disclose has "substantial justification," that party "shall not, unless such failure is harmless, be permitted to use [the information] as evidence at a trial, at a hearing, or on a motion . . . ." Complainant argues there can be no substantial justification for the failure, since Ms. Maybray is employed by Respondent (actually,

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<sup>45</sup> The Federal Rules of Civil Procedure apply in the absence of contrary authority, pursuant to 29 C.F.R. § 18.1(a).

by Respondent's successor in interest). (See Complainant's Response to Respondent's Cross-motion for Summary Judgment, p. 8). Complainant also argues that the failure was not harmless, because he was denied the opportunity to depose Ms. Maybray, and his expert witnesses were denied the opportunity to respond to her statements. (See id., p. 9).

In response, Respondent seems to argue that the failure to list Ms. Maybray is excused by alleged statements of Complainant's counsel that he did not need any more discovery; based on this statement, Complainant claims all work on discovery responses ceased. (See Respondent's Supplemental Memorandum of Law (December 4, 1998), p. 3). Respondent also cites Brandt v. Vulcan, Inc., 30 F.3d 752 (7<sup>th</sup> Cir. 1994), for the proposition that sanctions are only appropriate when a party has violated a discovery order; in this case, no discovery order was ever requested or issued.

However, I agree with Complainant in several respects. First, as I read the relevant rules, Respondent was under a continuing duty to disclose the identity of persons who may have held relevant and discoverable information. (See 29 C.F.R. § 18.16(a); FRCP 26(a)). Even if there was no continuing duty, it is clear that Complainant made numerous requests for this information. (See Complainant's Response to Respondent's Cross-motion for Summary Judgment, pp. 4-6).

Secondly, I also agree that there can be no substantial justification for Respondent's failure to identify Ms. Maybray earlier; I also note that Respondent's only attempt to justify this failure seems to be the argument that Complainant's attorney "represented that he did not need any further discovery." (See Respondent's Supplemental Memorandum of Law (December 4, 1998), p. 4).

Third, I believe that the Brandt case is inapposite for several reasons. It addresses the question of sanctions under FRCP 37(b), not Rule 37(c) as is the case here. (See Brandt, 30 F.3d 752, 756-57). It would also be unrealistic to require Complainant to move for a discovery order on these facts. Respondent had provided the names of other witnesses in response to discovery requests; Complainant had no way of knowing that Respondent would choose to introduce additional witnesses at this late date.

Finally, the advisory committee's notes for FRCP 37, subdivision (c) explain that the rule provides a "self-executing sanction for failure to make a disclosure required by Rule 26(a), without the need for a motion under subdivision (a)(2)(A)." These notes are not law, but they are persuasive evidence of the intent of the drafters of the FRCP.

While I agree with Complainant that it would be inappropriate to simply allow in the affidavit, I think it is possible to resolve this issue so that the failure becomes harmless. I believe that this evidence is certainly relevant, and indeed could be dispositive once properly admitted. In order to cure Respondent's failure, I order that Respondent provide Complainant with the opportunity to depose Ms. Maybray, and to fully and completely comply with any and all existing discovery requests. Additionally, since Respondent failed to properly disclose Ms. Maybray in the first place, I impose an alternate sanction as provided by FRCP 37(c)(1); Respondent shall pay all reasonable costs related to the deposition of Ms. Maybray.

Based on the foregoing, it would be improper to grant summary judgment on the issue of benefits for either party at this time. Therefore, both parties' motions for summary judgment on the issue of benefits are denied.

### 5. Interim Earnings

To correctly compensate Complainant, the calculations must deduct "any amount that [Complainant] has earned in interim earnings between the issuance of the [ALJ's] Recommended Decision and Order on Remand and the date of final judgment." (ARB Dec., p. 7). Complainant argues that summary judgment on this issue is proper; Respondent argues that a formal hearing is needed.

The parties mainly disagree over Complainant's interim earnings from December 1994 to present. Respondent argues that depositions and discovery show a monthly shortfall in Complainant's family finances of \$500 to \$800 per month. (See Respondent's Cross-motion for Summary Judgment, p. 13). For example, in a recent letter to this court responding to Complainant's response (discussed below), Respondent pointed to the continued use of two cellular telephones by Complainant's family as evidence of some other source of income. Respondent therefore argues the amount of interim earnings is a disputed issue of material fact making summary judgment inappropriate. (See id., p. 14).

Complainant acknowledges the apparent monthly shortfall, but responds that this truly represents the family's financial situation. (See Complainant's Response to Respondent's Cross-motion for Summary Judgment, pp. 12-14). Complainant points to deposition testimony and other discovery wherein the Complainant and his family admitted to sinking deeper in debt each month, and where they explained that the monthly shortfall is covered through credit cards, mortgages, and personal loans. (See id.).

Additionally, Complainant notes that the ARB has already stated that \$500.00 a year, or \$2,500.00 total, should be deducted from Complainant's front pay award. (See ARB Dec., p. 8). Complainant argues it would be improper to deduct both the \$500.00 and the actual amount of interim earnings since this would result in a "double-dip" for Respondent. (See Complainant's Response, p. 11).

I first note that this is yet another dispute which arises from the slow progress of this case. The ARB decided in September 1996, nearly a year before the beginning of the front pay period stipulated to by the parties, that a deduction of \$500.00 per year from the front pay award would be appropriate. The ARB arrived at this figure by taking the average of Complainant's earnings over the six years prior to the hearing. (See ARB Dec., p. 8). Thus, the \$500.00 was merely a speculative estimate of what Complainant probably would earn in the future; the ARB could not have known that the front pay period would actually begin to run before final judgment, thus making it possible to determine the true amount of interim earnings for at least some years.

I find that for the portion of the front pay period which has already run, I need not resort to a speculative estimate of what Complainant might earn. Complainant is also correct that Respondent should not be allowed to "double dip." Therefore, for each year, Respondent is entitled either to the \$500.00 yearly deduction, or a deduction equal to the amount of proven earnings for any year which has already passed. If, at final judgment, a portion of any front pay year has already passed, the deduction shall be either \$500.00 or the actual amount earned prior to that date, whichever is higher. For any full years left to run in the front pay period, the \$500.00 deduction shall stand.

Because I believe there is still a "genuine issue of material fact" as to actual interim earnings, summary judgment is not appropriate on this issue at this time.

### **ORDER**

It is therefore ORDERED that:

- (1) Respondent shall pay Complainant a back pay principal for 1988 of \$2,288.00;
- (2) Respondent shall pay Complainant a back pay principal for January 1989 to June 30, 1997 of \$216,090.00;
- (3) Respondent shall pay Complainant a total front pay principal of \$154,695.00;
- (4) Respondent shall pay Complainant prejudgment interest on both front pay and back pay. Prejudgment interest is to be calculated using simple, not compound interest, and in conformity with the methods outlined above;
- (5) Both Complainant's and Respondent's Motions for Summary Judgment on the issue of benefits are hereby DENIED;
- (6) Complainant's Motion for Summary Judgment on the issue of interim earnings is also hereby DENIED.

So ORDERED this the 17th day of December, 1998 at Metairie, Louisiana

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RICHARD D. MILLS  
Administrative Law Judge